

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7317

To be argued by
LYMAN STANSKY

In The
United States Court of Appeals

For The Second Circuit

GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

-against-

HENRY H. WELDON,
Defendant-Appellee

GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

-against-

CHARLES B. WRIGHTSMAN and JAYNE WRIGHTSMAN,
Defendants-Appellees.

GEORGE STROGANOFF-SCHERBATOFF,
Plaintiff-Appellant,

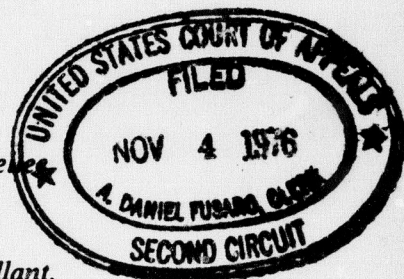
-against-

METROPOLITAN MUSEUM OF ART,
Defendant-Appellee.

*On Appeal from the United States District Court for the
Southern District of New York.*

BRIEF FOR PLAINTIFF-APPELLANT

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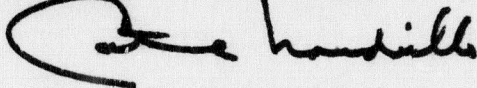
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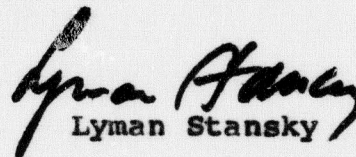
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LYMAN STANSKY, being duly sworn, deposes and says,
that deponent is over the age of 21.

That on the ~~2nd~~ day of November, 1976, deponent served two (2) copies of Appellant's Brief and Reply Brief upon Davis, Polk & Wardwell, Esqs., Lord, Day & Lord, Esqs., and Thal & Youtt, Esqs., respectively the attorneys for Charles B. Wrightsman and Jayne Wrightsman, Metropolitan Museum of Art, and Henry H. Weldon, appellees in this action, at their respective addresses: #1 Chase Manhattan Plaza, New York, N.Y. 10005; #25 Broadway, New York, N.Y. 10004; and #919 Third Avenue, New York, N.Y. 10022; the respective addresses designated by said attorneys for that purpose, by depositing two true copies of the same enclosed in post-paid properly addressed wrappers, in a post office, official depository under the exclusive care and custody of the United States post office department within New York State.

Sworn to before me this)
2nd day of November, 1976.)




Lyman Stansky

GATHERINE NARDIELLO
Commissioner of Deeds, City of New York
N. Y. Co. Clks. No. 8, Reg. No. 0-N-12
since Jan. 1, 1978

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Defendant-Appellee

On appeal from the United States District Court
for the Southern District of New York

BRIEF OF PLAINTIFF-APPELLANT

Statement.

Plaintiff appeals from a summary judgment of Hon.
Dudley Bonsal, dismissing the complaints, entered in favor of
defendants in the United States District Court for the Southern
District of New York, on motion of defendants Weldon and
Wrightsmen. Defendant Metropolitan did not move.

The actions were for conversion. They were dismissed on the ground that the Act of State doctrine (156a-8) was dispositive (Wrightsman 12).

Issues Presented For Review

1. The court erred in finding that the works of art were appropriated by the Soviet Government in Russia.
2. The court erred in finding that the works of art were transported by the Soviet Government to Berlin for sale.
3. The court erred in finding that the sale in Berlin was carried out under the direction and with the consent of the Soviet Government.
4. The court erred in applying the Act of State doctrine absent legally sufficient factual bases therefor.

On or about December 21, 1973, plaintiff made written demand on Weldon for a painting of which he claimed the right to possession. The action for conversion was instituted on (22a-2,6) February 6, 1974. (Weldon 6, Demand)

On or about November 21, 1974, plaintiff made written demand on the Wrightsman defendants (Wrightsman) for a bust of (106a-4) Diderot by Houdon. (Wrightsman 5, Demand) The action for conversion was instituted on January 2, 1975 (2) (119a-2).

When it appeared that, after that demand had been made, the Wrightsmans transferred the Diderot to the Metropolitan Museum of Art (Metropolitan) written demand therefor was made on June 9, 1975. The action for conversion was instituted on June 30, 1975. (Metropolitan 2)

The actions against the Wrightsmans and Metropolitan were consolidated by order of the court below. (Metropolitan 3)

By order of this court, made July 2, 1976, the appeals were consolidated.

A motion to defer preparation of Appendix or dispensing therewith under FRAP 30 (c) (f) CCR 30, is pending.

None of the defendants had pleaded the Act of State doctrine as a defense, except Wrightsman. Neither Weldon nor Metropolitan had moved to amend answer to plead the Act of State doctrine as a defense.

Facts

Plaintiff is the sole surviving scion of the family that owned these objects of art, claiming ownership by inheritance from his deceased mother in 1944. She had inherited them from her brother-in-law, who had died in 1924. They were sold at auction in Berlin in 1931 to divers purchasers, and eventually found their way into the hands of defendants at bar. (Weldon 6; (119a-2)

These actions were instituted after refusal to turn them over to appellant after written demand therefor.

Argument

The judgment is based, not on a resolution of any issue of plaintiff's legal right to the possession of these objects, nor on the defense of Statute of Limitations, but on the defense projected on motion by Wrightsman and Weldon, that the objects had been confiscated by the Russian government (USSR) in Russia, and, having been sold by its order in Berlin, title in defendants could not be questioned in our courts because these were Acts of State.

Appellant does not challenge the Act of State doctrine as sound law. The issue on appeal is that, appellees having the burden of proof of the special defense of Act of State, failed to support the same by a fair preponderance of credible evidence on their motions for summary judgment. (Minutes of Pre-trial Conference, December 8, 1975. Page 7, line 19; page 12, line 18) (139a-7; 144a-12)

Appellant agrees with the view projected by appellee Weldon in his memorandum below:

"...a summary disposition...should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party."

It is respectfully submitted that the evidence submitted by appellees failed to meet this requirement.

POINT I

In granting summary judgment, the court below erred by applying the Act of State doctrine on evidence that fell short of proving that the objects of art had been appropriated by the Russian government (USSR) within its territorial limits, and had been sold in Berlin by its order.

Our courts will not sit in judgment on the acts of a foreign government performed within its own territory.

Banco National de Cuba v. Sabbatino (1964)
376 U.S. 398, 428

Banco de Espana v. Federal Reserve Bank
(2d Circuit 1940) 114 Fed.2d 438)

This is the Act of State doctrine, on the application of which the judgment appealed from is based. Appellant does not question its validity, but only its application to the facts at bar.

Of the three appellees, only Wrightsman had pleaded the Act of State doctrine. Appellees had the burden of proving the basic fact that the objects of art had been confiscated by the USSR in Russia prior to the sale in Berlin.

Wrightsmen made the more comprehensive effort to present the evidence therefor, as follows:

- EXHIBIT A - appellant's unsworn deposition in
74 CIV 3809 (42a)
- EXHIBIT B - the title page of the 1931 Lepke
auction catalogue of the Stroganoff
collection (71a)
- EXHIBIT C - "A Brief Guide" to the Stroganoff
Palace Museum, in Russian and English (74a)
- EXHIBIT D - an article in the Bulletin of the
Society of the History of French Art
published in Paris, in French and English (94a)
(103a)
- EXHIBIT E - appellant's unsworn answer to interrogatories
- EXHIBIT F - an illegible newspaper report (107a)
- EXHIBIT G - decrees attributed to the All-Russian
Central Executive Committee and to the
Council of Peoples' Commissars, in Russian
and English (108a)
- EXHIBIT H - translator's affidavit of accuracy of trans-
lations from Russian of Exhibits C and G (114a)
- EXHIBIT I - translator's affidavit of accuracy of trans-
lations from French of Exhibit D (116a)
- Wille affidavit of December 5, 1975 re Exhibit B. (116a)
- Wrightsmen affidavit of February 5, 1976. (148a)

At the pre-trial conference of December 8, 1975, Wrightsman for the first time presented a copy"of some 1918 materials of the Soviet system" (page 3, line 25), an alleged copy of the 1923 constitution (p.4, l.14), and the claim that the 1918 and 1923 constitutions described the entities named in Exhibit G. On inspection on August 24, 1976 of the files transmitted by the lower court to this court, these documents were not found, nor was there any indication that they had been marked as exhibits, nor was their inclusion in the appendix requested

The minutes of this conference show that appellant did not dispute the validity of the Act of State doctrine qua doctrine, but took the same position as on appeal; that the burden of proving the facts on which application had to be based, was on appellees, and that they had failed to present sufficient proof (p.7, l.12). The court below correctly stated his position:

"THE COURT: You don't quarrel with Mr. Whipple's views on the State doctrine. You say it doesn't apply here because you say he has the burden here of showing that these people were government agencies." (p.12, l.18)

Examination of appellees' efforts to satisfy their burden of proof demonstrates that they have failed to sustain it by a fair preponderance of the credible evidence.

EXHIBIT A

This Exhibit is discussed in Point II.

EXHIBIT B

The Berlin auctioneer's 1931 Stroganoff catalogue title page is the basis of the argument that the seller, "Handelvertretung der Union der Sozialistischen sowjet-Republiken" was a USSR agency. But this is not relevant. The Act of State doctrine immunizes from attack in our courts acts performed by a government within its territory. If USSR did not confiscate these objects in Russia, then the sale in Berlin, even if "Handelvertretung" were the USSR, would deprive appellees of that defense, as the sale qua sale in Berlin would have been an act of appropriation outside the territorial limits of the USSR.

EXHIBIT C

This is a 12 page translation of "A Brief Guide" allegedly printed in Petersburg (sic) in 1922 "Upon the instruction of the State Museum Fund," setting forth that ...following the suggestion of the Section of Museums and Safeguarding of monuments of art and antiquity...the scholarly staff of the picture gallery of the State Hermitage...proceeded to install a museum in the Stroganov (sic) palace."

The alleged original document in Russian is also attached, but there is no proof of its origin or authenticity. Even if authentic, it does not prove the confiscation of the objects of art at bar b. the USSR.

EXHIBIT D

This purports to be a magazine article translated from the French, allegedly appearing in the Bulletin of the Society of French Art, privately published in 1931 in Paris. It mentions that the Soviet government had to resort to the sale of art "to finance its imports or to feed its propaganda"; that "Some of the big Petersberg (sic) collections which were not incorporated in the Hermitage remained at their locations in the palaces, which had been transformed into 'palace museums'."

But the writer fails to give any official sources of his information, nor does he claim, for whatever it might have been worth, that the Stroganoff collection had been confiscated by the USSR in Russia.

EXHIBIT E

This exhibit is discussed under Point II.

EXHIBIT F

This is an illegible reproduction of a newspaper article of appellant's mother's objection to the Lepke sale, referred to, but not a fact on which the judgment is based.

Assuming its burden to be her claim that the USSR had illegally confiscated her property, this would not be the first time that the aggrieved has mistaken the identity of the transgressor. Appellant's mother was then living in France, and was

not at the sale. She assumed, but could not know, that it was the USSR that had appropriated the collection in Russia.

To use the protest of a distraught fugitive from the Bolsheviks as an admission against interest to defeat appellant's rights, seems rather unfair, farfetched and fairly untenable, absent proof by appellees of confiscation in the USSR.

EXHIBIT G

This purports to be a translation of decrees of the "All-Russian Central Executive Committee and of the Council of Peoples' Commissars." On December 8, 1975, at the pre-trial conference above referred to, Wrightsman's counsel produced what he described as the 1918 and 1923 constitutions.

This apparently supplemented a November 17, 1975 presentation by Wrightsman of a 4-page 1950, and a 35-page 1953 issue of "Materials for the Study of Soviet System" (MSSS) by Messrs. Meisel and Kozara.

According to the 35-page MSSS, "The All-Russian Congress of Soviets, of Workers', Peasants', Cossacks', and Red Army Deputies" is the supreme authority of the Russian Socialist Federal Soviet Republic (p.81); the "All-Russian Central Executive Committee" is the supreme legislative, administrative and controlling body (p.82), and with the "Council of Peoples Commissaries" rests the general direction of the affairs of the Republic, (p.83), and so on. But

nowhere do we find the specific entities mentioned on which the defendants rely as their proof that the USSR or an agency thereof confiscated the objects.

The closest is the "Council of Peoples' Commissaries" (MSSS p.83). But defendants' Exhibit G mentions only the Council of Peoples' Commissars, with power to inventory art objects, but (109a-2) forbidden to sell them abroad (Exhibit G, page 2). No decree was offered rescinding this prohibition. Chapter VIII, page 83, of the MSSS has nothing to do with that activity.

Memory and notes do not permit claim by appellant that there was any mention in these or the December 8 document of these as government agencies. None of the documentation were marked as exhibits, nor was their inclusion in the appendix requested by any appellee. These entities have important sounding names, but none appears in that form in the translations of the constitution nor any of the other documentation submitted by appellees.

Nor are any of these foreign documents authenticated as required by Rule 902 of the Federal Rules of Evidence.

EXHIBIT H

An employee of Wrightsman's counsel swears that he made a correct translation of the Russian exhibits. Although he describes some of the documents as "decrees" of Russian committees, he does

not pretend to knowledge or expert opinion, that this is what they are, nor did counsel on argument present proof that these alleged decrees were official decrees of the USSR.

EXHIBIT I

Wille, another employee, swears that he translated the French magazine article correctly. Appellant does not concede its relevance or probative force.

Nor do the new Federal Rules of Evidence give aid or comfort to appellees. They do not transmute that which is not, into competent evidence.

The court below apparently took judicial notice of the alleged decrees and alleged constitutions presented by appellees, but his rule is applicable only to documents "whose accuracy cannot reasonably be questioned" (Rule 201)

No Rule 301 presumption should have been applied, because the burden of proof was still with appellees, especially when it was challenged at the pre-trial conference. They failed to sustain the burden, even if there were a presumption that the documentation presented was what it purported to be.

Rule 803 is of no aid to appellees because, although some of the documents were allegedly "in existence twenty years or more," that rule applies only to those whose authenticity had

been established. Except for Exhibit B, the authenticity of none of the documents presented was established or admitted.

Rule 902 requires extrinsic evidence of authenticity as a condition precedent to admissibility, by compliance with the procedures therein detailed for authentication of foreign published documents.

Nevertheless, the court below accepted this documentation as persuasive, stating in his decision:

"It appears undisputed that both (objects)...were sold in Berlin...by order of the Handelsvertretung or Trade Consulate of the U.S.S.R." (page 3) (151a-3)

His footnote refers to the affidavit of Johann Wille dated December 5, 1975 but that concerns itself only with the accuracy of the translation of the words and not with the question of whether Handelsvertretung was a government agency. He erred in finding that:

"Here, the record shows that the works of art, whether in the Stroganoff Palace or in the Imperial Hermitage Museum, were appropriated by the Soviet Government under either Decree No. 111 of the Council of People's Commissars published on March 5, 1921, which nationalized all movable property of citizens who had fled the Soviet Union, (4) or Decree No. 245 of March 8, 1923, promulgated by the All-Russian Central Executive Committee and the Council of People's Commissars, which nationalized property housed in State Museums." (p.6) "While the actual sale of the works of art occurred in Berlin, the property had been seized in Russia by the Soviet Government." (p.8) (152a-4; 154a-6; 156a-8)

record is bare of proof that the Stroganoff collection, or any part thereof, had been confiscated, or was "nationalized property housed in State Museums." The lack of proof of confiscation in Russia is the missing but vital link that makes these findings erroneous.

Dismissal was actually based, not on competent and relevant proof, but on the popular concept that the USSR is and owns, confiscates and regulates, commands and disposes of, everything. Popular concepts do not rise to the dignity of legal evidence. It was once very widely held that the earth was flat and that the sun revolved around it. Appellees failed to prove that the USSR had confiscated the bust of Diderot by Houdon and the Bishop of Triesta by Van Dyck before May 1931 in the USSR.

The court below erred in granting summary judgment based on the Act of State doctrine on a record bare of proof sufficient to justify such application.

POINT II

The court below erred in depriving appellant of his day in court on disputed issues of fact.

After brushing aside appellant's objections to the exhibits discussed under Point I, the trial court below apparently gave little weight to appellant's sworn statements relevant to them,

EXHIBIT A

This is appellant's June 19, 1974, apparently unsworn deposition in 74 CIV 3809, by which appellees claim, appellant admitted that it was the USSR that had sold the Stroganoff collection in Berlin. The transcript does not seem to bear this out. It reads:

"Q. Was that auction conducted by the Union of Socialists Soviet Republic, do you know?

A. I don't know.

"Q. Do you know where the collection had been kept prior to 1931?

A. No.

"Q. When you say no, does that mean that you do not know at any time prior to 1931 where the collection was kept?

A. I knew until I left Russia in 1919. In our house, in the Stroganoff house in Petrograd." (p.4) (45a-4)

EXHIBIT E

Appellees cite as an admission against interest, appellant's apparently unsworn response to an interrogatory:

"7. Plaintiff contends that the bust was sold in or about May 13, 1931 at an auction sale in Berlin, Germany pursuant to the direction of the USSR."

However, in his affidavit sworn to December 1, 1975, appellant swore:

"This should be corrected by the insertion of the words, after the word 'direction,' 'of the Commercial Organization' Defendants' Exhibit B so states. The omission was inadvertent."

(122a-5; 126a-9)
(Exhibit A) also apparently unsworn to.

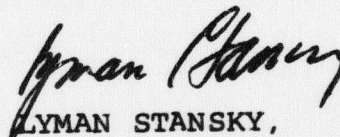
That appellant should not have been deprived of his day in court may be suggested by Wrightsman's affidavit, sworn to February 5, 1976. It may be only obliquely relevant to the issues on appeal, but his counsel apparently saw the necessity of having him swear that he had given the Diderot to the Metropolitan Museum of Art on November 24, 1974 "before the institution of this lawsuit." Although technically correct, it is a fact that written demand had been made on the Wrightsman defendants for the return of the Diderot to appellant on November 21, 1974. It was after this demand had been made that they donated it to the Metropolitan Museum.

The facts, not speculation on unauthenticated documents of doubtful relevance, should be dispositive of the issue: do the facts mandate the application of the Act of State doctrine?

CONCLUSION

The judgment should be reversed and appellant accorded his day in court.

Respectfully submitted,



LYMAN STANSKY,
Attorney for Plaintiff-Appellant